Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Coalition of Competitive	)	CC Docket No. 01-77
Fiber Providers for Declaratory Ruling	)	
of Sections 251(b)(4) and 224(f)(1)	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

SBC Communications Inc. (SBC) hereby submits its Comments opposing the Petition for Declaratory Ruling (Petition) filed by the Coalition of Competitive Fiber Providers (Coalition). The Coalition's request to interpret Section 224 as providing a virtually unlimited right of access to incumbent local exchange carrier (ILEC) central offices is untenable and contrary to more than 20 years of Commission precedent. The Commission has expressly held that Section 224 does not provide a general right of access to all property and equipment owned by the ILEC, and it has never sought to use Section 224 as the basis for requiring the occupation of utility property such as ILEC central offices. In fact, there would have been no reason for Congress to adopt Section 251(c)(6) if competitors already had an even broader right of access to ILEC central offices pursuant to Section 224.

It is clear from the timing of the Petition that the Coalition is attempting to circumvent the plain language of Section 251(c)(6) and the D.C. Circuit's decision in *GTE Service Corp. v. FCC*. The Coalition's strained interpretation of Section 224 would effectively read Section 251(c)(6) out of the Act and would result in an unlawful and unauthorized taking of ILEC property. There simply is no basis for the Coalition's claim that Section 224 provides an independent right of access that is significantly broader than the well-defined collocation limitations in Section 251(c)(6).

Finally, the Coalition does not propose any new collocation requirements that are consistent with Section 251(c)(6). No new requirements are necessary because competitive fiber providers already have sufficient access to ILEC central offices that allows them to connect with collocated CLECs. A competitive fiber provider does not have a right to occupy ILEC central

offices for any other purpose. For these reasons, the Commission should reject the Coalition's Petition.

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COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) hereby submits its Comments opposing the Petition for Declaratory Ruling filed by the Coalition of Competitive Fiber Providers (Coalition).[1] The Coalition seeks to use Sections 251(b)(4) and 224(f)(1) of the Communications Act (Act)[2] as the basis for gaining virtually unlimited access to property owned by incumbent local exchange carriers (ILECs) and other utilities despite years of Commission precedent to the contrary. Moreover, the Petition is a transparent attempt to circumvent the well-defined restrictions on collocation established by Congress in Section 251(c)(6) and reaffirmed by the D.C. Circuit Court of Appeals in *GTE Service Corp. v. FCC*.[3] The Commission should deny the Coalition's request to distort the plain meaning of the Act and effect an illegal and unauthorized taking of ILEC property.

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[1] Petition for Declaratory Ruling filed by the Coalition of Competitive Fiber Providers on March 15, 2001 (Petition).

[2] Section 251(b)(4) requires all LECs to provide "access to the poles, conduits, ducts and rights of way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with Section 224." Therefore, SBC's discussion focuses on the meaning of Section 224.

[3] 205 F.3d 416 (D.C. Cir. 2000).

I. Section 224(f)(1) Does Not Provide a General Right of Access to ILEC Central Offices and Other Utility Property

The Coalition audaciously ignores more than 20 years of history and crafts an entirely new meaning for Section 224 out of whole cloth. This significantly expanded interpretation of Section 224 would "encompass all wiring distribution systems used in ILEC central offices" and would allow competitive fiber providers to occupy ILEC central offices for the purpose of installing dark fiber and other hardware such as distribution frames, connection devices and power supplies.[4] In short, the Coalition argues that Section 224 should be used to give competitors virtually unlimited access to ILEC central offices for any purpose whatsoever. That is not what Congress or the Commission intended.

Congress enacted Section 224 in 1978 to prevent cable operators from being denied access to poles, ducts, conduits and rights-of-way owned or controlled by utilities as they sought to expand.[5] The Commission has never interpreted Section 224 to provide a right to occupy utility property such as ILEC central offices, cable head-ends and transformer stations, as the Coalition now advocates. Moreover, as discussed further below, the Commission's previous attempt to rely on an expansive interpretation of its authority (in that case, Section 201(a) of the Act) to require occupation or "physical collocation" in ILEC central offices, was unsuccessful. In *Bell Atlantic v. FCC*, the D.C. Circuit reversed the Commission's decision and held that

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[4] Petition at ii. SBC notes that the Coalition's interpretation of Section 224 is not, and indeed could not be, limited to ILEC central offices. Any declaratory ruling regarding the scope of Section 224 would apply with equal force to comparable utility property that is used to house equipment, such as cable head-ends and electric transformer stations.

[5] *Implementation of Section 703 of the Telecommunications Act of 1996 Amendments and Additions to the Commission's Rules Governing Pole Attachments*, CS Docket No. 96-166, Order, 11 FCC Rcd 9541, 9542 (1996) (*Pole Attachment Amendment Order*).

Section 201(a) did not give the Commission the authority to require a physical taking.[6] Therefore, it is not surprising that the Commission has never sought to use Section 224 as the basis for requiring the occupation of utility property such as ILEC central offices.

The Telecommunications Act of 1996 (1996 Act) expanded the scope of Section 224 to include telecommunications services and it prescribed a new rate methodology for determining pole attachment rates for telecommunications service providers.[7] However, the 1996 Act did not in any way alter or expand the reach of Section 224 beyond the traditional categories of poles, ducts, conduits and rights-of-way. That portion of Section 224 was unaffected by the 1996 Act, and the Commission did not change its reading of Section 224 after the 1996 Act was adopted. As the Commission recognized in the *Local Competition Order*:

> The intent of Congress in Section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by the utility, *as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.*[8]

Thus, the 1996 Act did not suddenly transform Section 224 into a mechanism for obtaining more extensive access to utility property than previously existed.

Indeed, the fact that Congress adopted a specific collocation provision in the 1996 Act proves that it did not intend for Section 224 to grant a right of access to ILEC central offices. It would have been completely unnecessary for Congress to adopt Section 251(c)(6) if it had intended for Section 224 to give competing telecommunications carriers a general right of access

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[6] 24 F.3d 1441 (D.C. Cir. 1994).

[7] *Pole Attachment Amendment Order*, 11 FCC Rcd at 9543-9544.

[8] *In the Matter of Telecommunications Act of 1996: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16085 (1996) (*Local Competition Order*).

to utility property such as ILEC central offices. Moreover, as discussed further below, it would have been pointless for Congress to impose strict limitations on collocation rights under Section 251(c)(6) if, at the same time, it was giving competitive telecommunications services providers a much broader right of access to ILEC central offices under Section 224. The inescapable conclusion is that the right to occupy ILEC central offices is governed *exclusively* by the provisions of Section 251(c)(6), and not by Section 224.

The Coalition's reliance on the *MTE Order* to support its novel interpretation of Section 224(f) is unavailing. In the *MTE Order*, the Commission reaffirmed that "Section 224 does not encompass a general right of access to utility property."[9] While the Commission recognized a right of access within buildings, it did so where ducts and conduits are being used to deliver service to end users in a multiple tenant environment (MTE). Here, by contrast, the buildings at issue are owned by the ILECs for the purpose of housing their own equipment, which is simply not analogous to a distribution network that is used to provide service to multiple end users in an MTE. The Coalition's assertion that the Commission "carefully left open for future determination that rights-of-way for purposes of Section 224(f)(1) exist in ILEC central offices" has no support anywhere in the *MTE Order* and, in fact, is contradicted by 20 years of Commission precedent.

Another fatal flaw in the Petition is that it demands a right of access for competitive fiber providers under Section 224 *even when they are not acting as telecommunications carriers*. The Coalition members acknowledge that they provide dark fiber and are seeking to install dark fiber

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[9] *MTE Order* at ¶ 82.

in central offices to accommodate future CLEC requests for fiber capacity.[10] As SBC explained in its comments filed in the Commission's collocation proceeding, providers of dark fiber facilities are not telecommunications carriers,[11] which means they are not entitled to a right of access pursuant to Section 224 or collocation pursuant to Section 251(c)(6). Under the 1996 Act, "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."[12] Because dark fiber, by definition, is incapable of carrying telecommunications services,[13] a provider of dark fiber facilities is not a telecommunications carrier and, as such, has no rights under Sections 224 or 251(c)(6).[14] Therefore, even if the Coalition's position regarding the scope of Section 224 were correct (which it is not), the Coalition members would still not be entitled to access ILEC central offices for the purposes of installing dark fiber or other hardware for future service.

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[10] Petition at 16-17.

[11] *See* Comments of SBC Communications, Inc. filed in CC Docket Nos. 98-147 and 98-96 on October 12, 2000.

[12] 47 U.S.C. § 153(43).

[13] In the *UNE Remand Order*, the Commission defined dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it, and thereby render it capable of carrying telecommunications services." *Implementation of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3776 (1999) (*UNE Remand Order*).

[14] While the Coalition relies on *Gulf Power Co. v. FCC* to support its position that dark fiber may be installed in ILEC central offices, that decision actually helps to disprove the Coalition's argument. The 11th Circuit expressly held that "[b]ecause dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply an inactive fiber." *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1279 (2000), *cert. granted* 121 S. Ct. 879 (January 22, 2001). The court's ruling was limited to the narrow issue that it was reasonable for the Commission to consider pure dark fiber located within cables that also contain lit fibers as one attachment. *Id.*

II. The Petition is a Transparent Attempt to Circumvent the Strict Collocation Limitations of Section 251(c)(6) as Upheld by the D.C. Circuit

The Petition is a transparent attempt to circumvent the strict collocation limitations imposed by Section 251(c)(6) and the D.C. Circuit's decision upholding those limitations. In fact, the Coalition emphasizes that the right of access it asserts under Section 224 is "independent of any rights competitive fiber providers may have to collocate in ILEC central offices pursuant to Section 251(c)(6)."[15] The Coalition further states that interconnection or access to unbundled network elements is not a precondition to occupying ILEC central offices under Section 224, and that CLECs may use Section 224 to cross-connect with other CLECs regardless of the limitations of Section 251(c)(6).[16] The Coalition's expansive interpretation of Section 224 would effectively read Section 251(c)(6) out of the statute and would result in an unlawful and unauthorized taking of ILEC property. Moreover, it is nonsensical for the Coalition to suggest that a competitive fiber provider connecting to a collocated CLEC has rights under Section 224 that trump the restrictions of Section 251(c)(6). The only reason CLECs are located in ILEC central offices in the first place is because of the collocation provisions of Section 251(c)(6).

Because the physical occupation of ILEC central offices constitutes a taking, any right of occupation must be narrowly defined. Courts have consistently held that without an express grant of authority from Congress to order a physical taking, the Commission is without general authority to do so. In *Bell Atlantic v. FCC*, for example, the D.C. Circuit vacated the Commission's attempt to require physical collocation of competitors' equipment pursuant to its

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[15] Petition at (i).

[16] *Id.*

general authority under Section 201(a) to order "physical connections" as necessary for the public interest. As the court stated:

> The order of physical co-location, therefore, must fall unless any fair reading of § 201(a) would discern the requisite authority [to undertake a physical taking]. The Commission's power to order "physical connections," undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a Section of the LEC's central offices.[17]

Thus, the court required an express grant of authority to require a physical taking of LEC property, rather than allowing the Commission to rely on Section 201(a).

Section 251(c)(6) provides the Commission with an express grant of authority to require physical collocation, but it strictly limits the type of equipment that CLECs can collocate to "equipment that is necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."[18] In the *Advanced Services Collocation Order*, the Commission sought to expand the type of equipment that competitors could collocate beyond this statutory authorization.[19] Under the rules adopted in the *Advanced Services Order*, incumbent carriers were required to permit competitors to collocate any equipment that was "used or useful" for interconnection or access to unbundled network elements (UNEs), even if only a portion of the equipment was actually used for those purposes.[20] The Commission further held that incumbents were required to permit a competitor to cross-connect its equipment to the facilities of another collocated carrier (as opposed to the ILEC's facilities), and to allow

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[17] 24 F.3d at 1446.

[18] 47 U.S.C. § 251(c)(6).

[19] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4784-85 (1999) (*Advanced Services Collocation Order*).

[20] *Id.* at 4776-77.

competitors to locate their equipment in any unused space in the ILEC's premises without the construction of any cage or separate entrance.[21]

The D.C. Circuit rejected each of these determinations and held that the 1996 Act did not authorize the expansive collocation regime established by the Commission.[22] The Court held that the Commission's interpretation of the term "necessary" in Section 251(c)(6) "diverge[d] from any realistic meaning of the statute, because the Commission has favored the LECs' competitors in ways that exceed what is 'necessary' to achieve reasonable 'physical collocation' and in ways that may result in unnecessary takings of LEC property."[23] Thus, the D.C. Circuit made clear that, under the 1996 Act, competitors have a right to collocate only that "equipment that is required or indispensable to achieve interconnection or access to unbundled elements at the premises of the local exchange carrier."[24]

The D.C. Circuit agreed with petitioners that the *Advanced Services Order* improperly required the collocation of multi-functional equipment that does "more than what is required to achieve interconnection or access" to UNEs.[25] Similarly, the court rejected the Commission's cross-connect requirement and held that Section 251(c)(6) is "focused solely on connecting new competitors to LECs' networks," and not on allowing one collocating competitor to interconnect

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[21] *Id.* at 4784-85.

[22] *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

[23] *Id.* at 421.

[24] *Id.*

[25] *Id.*

with another collocating carrier.[26] The court also rejected the Commission's requirement that competitors be allowed to collocate in any unused space over the objection of LEC property owners.[27] In all of these cases, the court found that "delay and higher costs for new entrants . . . [that may] impede entry by competing local providers and delay competition cannot be used by the FCC to overcome statutory terms in the [1996 Act]."[28]

The Commission must adhere to the court's holdings and cannot attempt to use Section 224 as a way of avoiding the statutory limitations on collocation affirmed by the court. Any attempt to re-impose the cross-connect requirement or to adopt even broader collocation requirements under Section 224 would be at odds with the court's decision in *GTE Service Corp. v. FCC* and the plain language of Section 251(c)(6). Nevertheless, the Coalition completely disregards the D.C. Circuit's decision and specifically requests that competitors have the right to obtain access to ILEC central offices "irrespective of whether they will interconnect with, or access UNEs of, the ILEC." In particular, the Coalition requests the right to "install connector blocks and distribution frames at a convenient location in the ILEC central office."[29] This flies in the face of Section 251(c)(6), which provides that collocation is required *only* for the purpose of interconnecting and obtaining access to UNEs. Given that ILECs are not required to allow multi-functional equipment to be collocated in a central office, distribution frames and other hardware that permits total bypass of the ILEC's network certainly are not required under Section 251(c)(6).

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[26] *Id.* at 423.

[27] *Id.* at 426.

[28] *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999)).

[29] Petition at 16.

Likewise, the Coalition requests that the Commission specifically determine that CLECs may cross-connect in ILEC central offices despite the D.C. Circuit's clear holding to the contrary.[30] As previously discussed, the Coalition also requests the right to install dark fiber as a separate attachment, even though dark fiber is not a telecommunications service and thus bears no conceivable relationship to interconnection or UNEs.[31] In addition, the Coalition discusses placing equipment at a "convenient location" without acknowledging any limitation on a competitor's ability to choose space in the ILEC's premises, which again is exactly the type of requirement rejected by the court.[32] All of these Coalition requests are strictly prohibited by Section 251(c)(6) and most of them were specifically rejected by the court in *GTE Service Corp. v. FCC*.

Undeterred by statutory roadblocks, the Coalition ignores the court's ruling entirely and argues that Section 224 provides an "independent" right of access to ILEC central offices.[33] This creative attempt to bypass Section 251(c)(6) must fail. The Coalition's strained interpretation of Section 224 as an alternative and much broader right of access to ILEC central offices violates the fundamental principle of statutory construction that the specific provision governs the general provision.[34] That principle is particularly relevant here, where the Coalition's interpretation of the general statutory provision (Section 224) would completely nullify the well-defined

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[30] *Id.* at 15.

[31] *Id.* at 16.

[32] *Id.*

[33] *Id.* at 6.

[34] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

limitations contained in the specific statutory provision (Section 251(c)(6)) and reverse more than 20 years of Commission precedent.

The Coalition's interpretation also is a transparent attempt to circumvent the court's holding in *GTE Service Corp. v. FCC*. Both the timing and the substance of the Petition demonstrate that it is intended to give the Commission a way to avoid complying with the D.C. Circuit's decision on remand and to encourage the Commission to adopt an even broader right of access to ILEC central offices. This ploy would not withstand judicial scrutiny and would likely evoke a harsh response from the court. The D.C. Circuit previously rejected the Commission's attempt to rely on Section 201 as the basis for requiring physical collocation and the Commission also would be unable to justify a finding that Section 224 provides a legal basis for a collocation requirement.

Moreover, the Coalition's claim that ILEC central offices are bottleneck facilities is baseless. As the Coalition acknowledges, competitive fiber providers want access to ILEC central offices so they can connect with CLECs.[35] A competitive fiber provider can always connect with a CLEC at the CLEC's premises or, as discussed further below, it can connect with a CLEC at the CLEC's collocation space.[36] A CLEC, in turn, is authorized to occupy an ILEC central office only for the purpose of collocating equipment that is necessary for interconnection or access to UNEs. The Coalition cannot overcome the plain language of Section 251(c)(6) by citing economic efficiencies or their ability to bring the newest technologies to customers. Nor can the Coalition overcome the fact that it is seeking to connect with CLECs that have very

[35] Petition at 2.

[36] This latter arrangement is permitted only where the competitive fiber provider is acting as an approved subcontractor for the CLEC and bringing fiber directly into the CLEC's collocation cage.

limited collocation rights. It would be an absurd result if competitive fiber providers had a broader right of access to ILEC central offices than CLECs that are collocated pursuant to Section 251(c)(6).

III. Competitor Fiber Providers Already Have Sufficient Access to ILEC Central Offices

The Petition is completely unnecessary and does not propose any new collocation requirements that are consistent with Section 251(c)(6). Contrary to the underlying premise of the Petition, competitive fiber providers already have sufficient access to ILEC central offices and are able to serve collocated CLECs. Of course, such access is predicated on a request for competitive transport facilities by a CLEC that has established a collocation arrangement pursuant to section 251(c)(6). As previously discussed, a competitive fiber provider does not have a right to occupy ILEC central office solely for the purpose of installing dark fiber or other hardware for future service.

Once a collocated CLEC requests competitive transport facilities, a competitive fiber provider can establish a direct connection with that CLEC in its central office space. In fact, many collocated CLECs currently *are* obtaining transport facilities from competitive fiber providers in this manner. Thus, competitive fiber providers are not limited to connecting with CLECs outside of ILEC central offices, as the Coalition claims.[37] In addition, the Coalition's concern about possible delays in establishing connections with CLECs is unfounded. A collocated CLEC has ample time to address issues such as fiber cable delivery once it has initiated the collocation process. Once the CLEC requests physical caged collocation in conditioned floor space, the CLEC has 90 days while its request is being processed to establish a

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[37] Petition at 8.

fiber connection and handle other details such as ordering equipment and training its technicians. The fiber connection is just one small part of the CLEC's collocation process.

The Coalition also raises the concern that ILECs afford access to the manhole nearest the central office (what it calls "manhole zero") on a basis that is "potentially unreasonably discriminatory," and it demands an unlimited right to access any manhole leading to the central office.[38] While it is unclear exactly what the Coalition is requesting, SBC's current practices already provide nondiscriminatory access to manholes so that competitors may extend fiber into its central offices. SBC does not designate a single "manhole zero" for all cables that enter and exit its central offices for a number of reasons, including: (i) the need to accommodate CLEC requests for diversified routes for their fiber cables; (ii) the need to manage congestion, safety hazards, network reliability and the direction of cable delivered to the central office; and (iii) the need to maintain the structural integrity of the central office structure itself. These are all legitimate factors that ILECs must be allowed to consider in managing access to the central office.

To the extent the Coalition is requesting direct access to "manhole zero" such access is unnecessary and would raise security concerns. SBC currently allows competitive fiber providers to leave extra fiber cable in the manhole that SBC will then pull into the central office so it can be connected to a collocated CLEC that has requested competitive transport service. The Coalition has not presented any evidence that this process is discriminatory or creates a problem that must be addressed. Moreover, permitting competitive fiber providers to gain direct access to manholes would create serious security concerns because it would give one competitor

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[38] *Id.* at 18.

access to most, if not all, the network cables of SBC and other competitors at that location. As a result, these network cables would be exposed to possible accidental or intentional harm.

IV. Conclusion

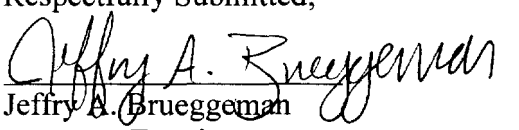
The Coalition's request to interpret Section 224 as providing a virtually unlimited right of access to ILEC central offices is untenable and contrary to more than 20 years of Commission precedent. The Commission has expressly held that Section 224 does not provide a general right of access to all property and equipment owned by the ILEC, and it has never sought to use Section 224 as the basis for requiring the occupation of utility property such as ILEC central offices. In fact, there would have been no reason for Congress to adopt Section 251(c)(6) if competitors already had an even broader right of access to ILEC central offices pursuant to Section 224.

It is clear from the timing of the Petition that the Coalition is attempting to circumvent the plain language of Section 251(c)(6) and the D.C. Circuit's decision in *GTE Service Corp. v. FCC*. The Coalition's strained interpretation of Section 224 would effectively read Section 251(c)(6) out of the Act and would result in an unlawful and unauthorized taking of ILEC property. There simply is no basis for the Coalition's claim that Section 224 provides an independent right of access that is significantly broader than the well-defined collocation limitations in Section 251(c)(6).

Finally, the Coalition does not propose any new collocation requirements that are consistent with Section 251(c)(6). No new requirements are necessary because competitive fiber providers already have sufficient access to ILEC central offices that allows them to connect with collocated CLECs. A competitive fiber provider does not have a right to occupy ILEC central

offices for any other purpose. For the foregoing reasons, the Commission should reject the Coalition's Petition.

Respectfully Submitted,



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April 23, 2001

CERTIFICATE OF SERVICE

I, Lacretia Hill, do hereby certify that on this 23rd day of April, a copy of the foregoing "Comments of SBC Communications Inc." was served by hand delivery to the parties below.

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